United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

74-1284

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For the Second Circuit

Docket No. 74-1284

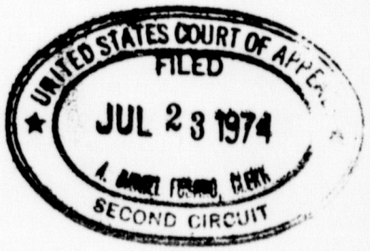
ANTHONY de CARVALHO,

Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.



REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

A. THE ISSUE.

The Immigration and Naturalization Service's (hereinafter referred to as "INS") argument misstates and clouds the issue in this case. INS states:

> the statute [Section 212(c)] permits a lawful permanent resident alien who is the subject of an exclusion proceeding to apply for discretionary relief...but precludes a lawful permanent resident alien who is the subject of a deportation proceeding from applying for such relief.
> (Respondent's Brief, page 1).

INS thus contends that the difference in treatment rests on whether an exclusion or a deportation proceeding is brought against the alien. This is inaccurate. Discretionary relief under §212(c), (8 U.S.C. §1182(c)), is available to a permanent resident in both an exclusion and a deportation proceeding. 8 C.F.R. §212.3; Matter of G----A----, 7 I&N,Dec. 274 (BIA, 1956); Matter of S----, 6 I&N, Dec. 392 (BIA, 1954, approved A.G., 1955). However, to be eligible for such relief in a deportation proceeding, the permanent resident must have left the United States and re-entered after his conviction. Matter of G----A----(supra); Matter of S----(supra); Matter of Arias-Uribe, 13 I&N, Dec. 696 (BIA, 1971). Thus the difference in treatment rests on whether the permanent resident alien left or remained in the United States after his conviction The issue is whether the Immigration and Nationality Act, Section 212(c), (8 U.S.C. §1182(c)) violates petitioner's Fifth Amendment equal protection right because it denies him an opportunity to request discretionary relief to continue domicile in the United States only because he remained in the United States after his conviction.

Contrary to INS's contention, the Ninth Circuit did not rule on the issue presented in this case. In Arias-Uribe,

the Ninth Circuit interpreted the statute §212(c), and found that it did not allow approval of an "application for advance permission to return to an unrelinquished domicile" in a deportation proceeding for an alien who remained in the United States after a narcotics conviction. Arias-Uribe v. I.N.S., 466 F.2d 1198 at 1199(1972). The Court distinguished those cases which allowed §212(c) relief in a deportation proceeding to permanent residents who had departed from and re-entered the United States after their convictions. Matter of S---- (supra); Matter of G----A----(supra). Petitioner does not contest INS's interpretation of the statute §212(c); rather he contends that the statute is unconstitutional because it denies him an opportunity to apply for discretionary relief only because he remained in the United States after his conviction.

B. EQUAL PROTECTION.

Equal protection analysis requires a decision as to what Equal Protection standard will be applied. INS does not contest petitioner's assertions that Section 212(c) violates equal protection under the "compelling state interest standard" or the "more demanding rational relationship standard." And petitioner will present no further argument under these standards except to point out that a more demanding and a more realistic version of the rational relationship test has been accepted, explicated and applied by this Court in several recent cases. Boraas v. Village of Belle Terre, 476 F.2d 806 (2nd Cir., 1973); Demiraqh v. DeVos, 476 F.2d 403(2nd Cir., 1973); and City of New York v. Richardson, 473 F.2d 923 (2nd Cir., 1973).[1]

INS misstates and misapplies the traditional rational relationship standadd. Its statement that equal protection bars the invidious classification is amorphous and without definition. The explanation of equal protection found in F.S. Royster Guano is detailed, logical and gives

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[1] It should be noted that although the Supreme Court overruled the Second Circuit's Decision in Boraas, it did not disapprove the Equal Protection standard this Court applied. Village of Belle Terre v. Boraas,---U.S.--- 39 L.Ed. 2d 797 (1974).

guidance to the function of applying law to fact.

> The [legislative] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.
>
> F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 at 415 (1920).

Further, the quotes with which INS supports its interpretation of equal protection are misleading because they are removed from the facts and reasonings of the cited cases. In Gruenwald v. Gardner, this Court relied on statistical data which showed "that women, as a class, earn less than men, [and] that their economic opportunities in higher age groups are less." 390 F. 2d 591 at 592 (2nd Cir., 1968). The Court thus found that there was a reasonable relationship between the classification, women, and the legislation's purpose, reduction of the economic disparity between men and women. The Court thereby found that the classes created by the legislative classification were not similarly situated and that the classification was reasonable and had a fair and substantial relation to the legislation's object. However, it must be noted that Congress subsequently removed the disparity between men and women in the challenged

statute, 42 U.S.C. §415 (b)(3).[2]

The quote cited from Fook Hong Mak v. I.N.S. referr to a question of administrative law: whether an administrato given discretionary power may apply that power by rule-making rather than on a case-by-case basis ? This issue is far removed from the issue of equal protection requirements. 435 F.2d 728 at 730 (2nd. Cir.,1970),(Respondent's Brief, page 1

INS's application of equal protection law to the facts of this case are circuitous and incorrect. It characterizes the purpose of §212(c) as ameliorating hardship to permanent residents who have left the United States and are being barred from re-entry. This confuses and combines classification and purpose. By such logic the classification in Rinaldi v. Yeager, 384 U.S. 305 (1966), would have been justified if the purpose were phrased as reimbursement from unsuccessful indigent appellants who were sentenced to jail rather than reimbursement from unsuccessful indigent appella

The purpose of §212(c) is to provide a means for ameliorating hardship. The classification is permanent

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[2] Pub.L. 92-603, Title I §104(b), Oct. 30,1972; see 42 U.S.C.A. §415(b)(3), (1974, Pocket Part).

residents of more than seven years domicile who have been convicted of a marijuana (or narcotics) related offense and who have voluntarily proceeded abroad after their conviction. In the context of this case the classification creates two classes: those who have remained in the United States after their conviction and those who have voluntarily proceeded abroad.

INS states that the difference in treatment is justified by the difference in exclusion and deportation. But the difference in treatment does not rest on that distinction. Some permanent residents subject to deportation and against whom deportation proceedings are brought may request and receive §212(c) relief. (see discussion page 2.)

Even if INS's distinction were correct, it faild to demonstrate how the difference in exclusion and deportation relates to the purpose of provision of a means to ameliorate hardship.

INS argues that "something" is related to the difference between conviction for marijuana or a narcotics related offenses and other crimes, but, does not state what that "something" is. A permanent resident of more than seven years convicted of a marijuana or narcotics related offense may seek §212(c) mlief in an exclusion proceeding, or in a

deportation proceeding if he left and returned to the United States after his conviction. A permanent resident of more than seven years convicted of a marijuana (or narcotics) related offense who remains in the United States after his conviction may not seek §212(c) relief. The differential treatment is not based on the difference between marijuana (or narcotics) offenses and other crimes.

INS argues that the Immigration and Nationality Act provides other forms of discretionary relief to deportable long-term permanent residents, specifically sections 244 and 245, (8 U.S.C. §1254, §1255). Not only do sections 244 245 have very different eligibility criteria than 212(c), they are not even applicable to persons such as petitioner.

Section 244, (8 U.S.C. §1254 (a)(2)) provides that in the case of a person deportable because of conviction for a marijuana (or Narcotics) related offense

> the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence [if] [the] alien applies to the Attorney General for suspension of deportation and ... has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act ... constituting a ground for deportation, and proves that during all of since period he has been and is a person of good moral character; and is a person

> whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. (Emphasis added.)

The eligibility for Section 244 are much more stringent than for §212(c) relief when applied to permanent residents. Section 212(c) offers relief to a permanent resident of seven years. Section 244 requires ten years residence with good moral character <u>after</u> commission of the narcotics offense plus <u>exceptional</u> and extremely unusual hardship to the alien or a citizen spouse, parent or child. Petitioner has lived in the United States for eighteen years but only seven years have passed since his conviction. Therefore he is not eligible for Section 244 relief. Farther, the legislative history of Section 244 demonstrates that Congress did not have permanent residents such as petitioner in mind when it imposed stringent limited eligibility criteria for suspension of deportation since the criteria were imposed to prevent abuses of status adjustment from non-immigrant to resident.[3] The House Report made it absolutely clear that the Congress was focusing on the Attorney General's discretion to adjust status, not to suspend deportation when it imposed stringent eligibility requirements for discretion:

The term "exceptional and extremely unusual hardship" requires some explanation. The committee is aware that in almost all cases of deportation, hardship and frequently unusual hardship is experienced by the alien or the members of his family who may be separated from the alien. The committee is aware, too, of the progressively increasing number of cases in which aliens are deliberately flouting our immigration laws by the processes of gaining admission into the United States illegally or ostensibly as nonimmigrants but with the intention of establishing themselves in a situation in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents. This practice is grossly unfair to aliens who await abroad their turn on the quota waiting lists and who are deprived of their quota numbers in favor of aliens who indulge in the abuse. This practice is threatening our entire immigration system and the incentive for the practice must be removed. Accordingly, under the bill, to justify the suspension of deportation the hardship must not only be unusual but must also be exceptionally and extremely unusual.[4]

Section 245 requires:

(1) that the alien be a native of the Eastern Hemisphere;

(2) that the alien is eligible to receive an immigrant visa and is admissible to the United States for

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[3] House Report, No. 1365, Feb. 14, 1952, to accompany H.R. 5678.

[4] 1952 U.S. Code Congressional and Administrative News, p. 1718 quoting House Report No. 1365, supra footnote "3".

permanent residence, and

(3) that an immigrant visa is immediately available to the alien at the time the application is approved.[5]

Petitioner is excludable as an alien who has been convicted of a marijuana related offense. §212(a)(23), (8 U.S.C. §1182 (a)(23)). The only way an excludable alien can meet the §245 requirement that he be eligible to receive an immigrant visa and be admissible to the United States is if he

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[5] Sec. 245(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

(b) Upon the approval of an application for adjustment made under subsection(a), the Attorney General shall record the alien's lawful admission for permanent residence as of the date the order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the number of the preference or nonpreference visas authorized to be issued under section 203(a) within the class to which the alien is chargeable, for the fiscal year then current.

(c) The provisions of this section shall not be applicable to any alien who is a native of any country of the Western Hemisphere or of any adjacent island named in section 101(b)(5).

obtains a waiver of his excludability.[6] There is no provision which allows a waiver of excludability based on conviction of a marijuana related offense. See §212(g),(h),(i), (8 U.S.C. §1182(g),(h),(i). Therefore petitioner is not eligible for §245 relief.

INS states, without citation,:

> [o]ne indispensable element, in raising an Equal Protection issue, is the existence of some right which is adversely affected of impinged upon.
>
> (Respondent's Brief, page 13.)

Application of equal protection does not require a pre-existent right. For example, in U.S. Dept. of Agriculture v. Moreno, the Supreme Court struck down §3(e) of the Food Stamp Act of 1964 as violative of "federal" equal protection. 413 U.S. 528 (1973). This statute created a right to food stamps to households but excluded any household containing an individual who was unrelated to any other member of the household. No person had a pre-existent right to food stampssbefore the statutory entitlement, and no person in a household with an unrelated member had a right to food stamps under the statute. Similarly, in petitioner's case, §212(c) creates a legal

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[6] See Tibke v. I.N.S., 338 F.2d 42 (2nd Cir., 1964).

capacity to request discretionary relief to continue domicile in the United States,[7] but excludes petitioner only because he remained in the United States after his conviction. Petitioner thereby is denied equal protection of law.

INS argues:

> Congress in exercising its plenary authority to make rules for the deportation and exclusion of aliens, may validly make discretionary relief available to one class of aliens and preclude such relief to another class of aliens.
>
> (Respondent's Brief, page 7.)

In support of this position, INS quotes Graham v. Richardson, 403 U.S. 365 (1971). But Graham v. Richardson dealt with federal as versus state power, not the constitutionality of a federal law. The phrase which INS quotes from this case in its full context is as follows:

> An additional reason why the state statutes at issue in these cases do not withstand constitutional scrutiny emerges from the area of federal-state relations. The National Government has "broad constitutional powers in determining what aliens shall be admitted to the United States, the period they remain, regulation of their conduct before naturalization and the terms and conditions of their naturalization."
>
> 403 U.S. at 376-377 (1971).

INS also refers to Chinese Exclusion Case, 130 U.S.

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[7] As petitioner makes clear in POINT I of his Brief, he recognizes that eligibility for discretionary relief does not compel the exercise of that discretion in his favor.

581 (1889) and Harisiades v. Shaughnessy, 342 U.S. 580(1952). The Chinese Exclusion Case, Chae Chan Ping v. United States did not involve an equal protection challenge to federal legislation either. This case dealt with the questions of whether an existing treaty impaired the validity of a Congressional Act and whether a government had power to exclude foreigners. However in dicta, the Court stated that what it termed "sovereign powers" are "restricted in their exercise" by the Constitution. 130 U.S. at 606.

Harisiades v. Shaughnessy decided the issue of "whether the United States constitutionally may deport a legally resident alien because of membership in the Communist Party..." 342 U.S. at 581. The Court found that "Congressional apprehension of foreign or internal dangers short of war" can authorize the exercise of the deportation power. 342 U.S. at 587. Under the historical conditions in 1940 and 1952, the Court felt that Congress was reasonable in its determination that there was a threat from Communist power without and Communist conspiracy within the United States. Further, the Court found that during the period of each alien's membership, the Communist party had taught and advocated overthrow of the Government of the United States by force and violence.

The issue and facts of Harisiades are thus far removed from those of petitioner's case. Petitioner in no way is involved with a threat to the very existence of the United States' form of government. He is deportable because of marijuana possession. He does not, as versus Harisiades, challenge the grounds of his deportable status. He contends only that when legislation affords discretionary relief to some long-term permanent residents and not to others, the legislation should meet the standards of equal protection.

However in the interest of fully informing the Court, petitioner recognizes that in dicta the Supreme Court stated that policies toward aliens are

> vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.
> 342 U.S. at 588-589.

Although INS does not rely or point to this statement in its brief, since it cites Harisiades, perhaps the statement is worthy of discussion. Firstly, the Court makes it absolutely clear that the statement is dicta and that its decision is

not based on the position expressed therein.[8] Secondly, even in this dicta, the Court does not say that such matters are totally immune from judicial inquiry; that the political branches have plenary power.

Petitioner asserts such dicta should not be controlling in his case. The dicta is found in a decision which reflects the political concerns of its time and is based on very different facts. It is not precise in its evaluation of valid judicial powers. Further, it rests on the assumption that policies toward aliens are:

> vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power and the maintenance of a republican form of government.
>
> 342 U.S. at 588-589.

Petitioner's case has absolutely no relevance to international political policies or to the existence of United States democracy.

Petitioner does not contest the position that the Federal Congress has power to make laws with regard to exclusion and deportation or the position that Congress may make discretionary relief available to one class of aliens

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[8] "These restraints upon the judiciary, occasioned by different events, do not control today's decision..." 342 U.S. at 589-590.

and not to another. Petitioner asserts only that when Congress affords discretionary relief by legislation to some long-term permanent residents and not to others, this legislation should be in accord with the Federal Constitution's Fifth Amendment. No where in INS's Brief is there a statement which specifically denies this assertion.

CONCLUSION

Section 212(c) denies petitioner equal protection of law in violation of the Fifth Amendment's Due Process Clause. Therefore the decision of the Board of Immigration Appeals dismissing petitioner's appeal should be overruled and petitioner should be allowed to apply for discretionary relief from deportation.

Respectfully submitted,

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